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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 ILIA DERUM, on behalf of herself
11 and all others similarly situated,
12
13 vs.
14 SAKS & COMPANY, a New York
15 corporation,
16
17 Defendant.

CASE NO. 14-cv-1921 JM (JLB)
ORDER DENYING SAKS &
COMPANY'S MOTION FOR
SUMMARY JUDGMENT

16 Before the court is Defendant Saks & Company's ("Saks's") motion for
17 summary judgment, (Doc. No. 15), and its related request for judicial notice, (Doc.
18 No. 15-3). The matters were fully briefed and were found suitable for resolution
19 without oral argument pursuant to Local Civil Rule 7.1.d.1. For the reasons set
20 forth below, the court denies Saks's motion for summary judgment and its request
21 for judicial notice.

22 **BACKGROUND**

23 In this putative class action, Plaintiff Ilia Derum asserts that Saks violated
24 California Labor Code § 226(a), which requires employers to provide accurate
25 itemized wage statements that include, among other things, the inclusive dates of
26 the relevant pay period.

27 Plaintiff was a sales associate for Saks at a Saks Off Fifth store for about
28 seven weeks, beginning on May 6, 2014. (Doc. No. 15-7 ("Joint Stip.") ¶ 1;

1 Doc. No.15-6 (“Rodriguez Decl.”) ¶ 3.) At the beginning of her employment, she
2 received, reviewed, and kept a copy of Saks’s “Associates Handbook.” (Joint Stip.
3 ¶ 2.) The handbook stated: “Hourly Associates are paid weekly and checks are
4 dated on Friday for the previous pay period. The pay period runs Sunday to
5 Saturday.” (Rodriguez Decl., Exh. B.) The handbook provided instructions for
6 how to sign up for Direct Deposit, and it stated: “If Direct Deposit is not elected,
7 live payroll checks are distributed via U.S. Mail to all Associates. 2008-current
8 payroll checks can be viewed in Employee Self Service (ESS) via the S⁴ Portal at:
9 <http://associates.saksincorporated.com>.” (Id.) It stated further:

10 There are two sections to paychecks:

11 1. The check.

12 2. A statement of your earnings for the pay period, as well as
13 deductions that you have authorized and/or the government requires,
are itemized.

14 (Id.)

15 Plaintiff was informed that hard-copy paychecks would include detachable
16 wage statements, and she chose to receive her checks by mail rather than by direct
17 deposit. (Doc. No. 19-2 (“Pl.’s Decl.”) ¶ 2; Doc. No. 15-5 (“Lowry Decl.”) ¶ 8.)
18 Accordingly, she was issued a paper paycheck every Friday from May 16, 2014,
19 to June 20, 2014. (Joint Stip. ¶ 3.) Attached to each paycheck was an itemized pay
20 stub, which listed, among other things, the number of hours worked, gross earnings,
21 itemized withholdings for taxes and other deductions, net pay, and the end date for
22 the pay period. (Joint Stip. ¶ 3; Pl.’s Decl., Exh. 1.) The parties agree, however,
23 that the hard-copy pay stubs did not include the beginning date of the pay period.
24 (Joint Stip. ¶ 3; Pl.’s Decl., Exh. 1.)

25 For each pay period, Saks also uploaded to its ESS website an electronic
26 wage statement. (Lowry Decl. ¶ 9 & Exh. A.) Unlike the pay stubs, the electronic
27 statements included the beginning date of the pay period. (Lowry Decl., Exh A.)

28 Because of an error in Plaintiff’s form W-4, all of her wages were being

1 withheld as taxes, so the net pay on her first four paychecks was listed as “00.”
2 (Pl.’s Decl. ¶¶ 9, 11 & Exh. 1.) What happened then is the matter of some dispute.

3 According to Maria Rodriguez, the store’s Selling and Service Manager,
4 when Plaintiff contacted her about the problem with her paychecks, Rodriguez sat
5 down with Plaintiff and used Plaintiff’s log-in and password to access the ESS
6 system and review Plaintiff’s electronic wage statements with her. (Rodriguez Decl.
7 ¶¶ 1, 7.) Rodriguez further states in her declaration that Plaintiff received a copy
8 of the Associates Handbook, and that a flyer posted in the employee break room
9 informed employees as to what their identification and passwords were to access
10 the ESS website. (Id. ¶ 4 & Exh. A.)

11 According to Plaintiff, when she contacted Rodriguez about the problem
12 with her paychecks, Rodriguez logged into the system, reviewed Plaintiff’s W-4
13 form without Plaintiff’s help and without showing Plaintiff her electronic wage
14 statements, and printed a new blank W-4 form for her to fill out. (Pl.’s Decl. ¶ 11.)
15 She does not remember anyone at Saks directing or encouraging her to review her
16 paychecks on ESS, and she does not recall anyone telling her that the information
17 contained in her pay stubs was in any way different from the information contained
18 in the electronic wage statements on ESS. (Id. ¶ 8.) She believed that her hard-
19 copy pay stubs were identical to the ESS statements, and no one told her anything
20 to make her think otherwise. (Id.) She also does not recall anyone encouraging her
21 to review the flyer and does not remember seeing it in the employee breakroom or
22 anywhere else. (Pl.’s Decl. ¶ 7.)

23 The parties agree, however, that Plaintiff never tried to access the ESS system
24 to retrieve her electronic wage statements. (Joint Stip. ¶ 4.)

25 Plaintiff initiated this putative class action in San Diego Superior Court
26 on July 15, 2014, alleging that Saks failed to provide proper wage statements in
27 violation of California Labor Code § 226(a) by failing to include the pay-period
28 start date on her pay stubs. (Doc. No. 1, Exh. 3.) Saks removed the case to this

1 court on August 15, 2014, pursuant to the Class Action Fairness Act, 28 U.S.C. §
 2 1332(d)(2). (Doc. No. 1.) On October 24, 2014, with leave of court, Plaintiff filed
 3 the operative first amended complaint, which added a cause of action for penalties
 4 under the Private Attorneys General Act of 2004 (“PAGA”), California Labor Code
 5 § 2699, based on the alleged violation of California Labor Code § 226(a). (Doc.
 6 No. 11.) Plaintiff seeks to litigate on behalf of all persons employed in California
 7 by Saks at any time since July 14, 2013. (Id. ¶ 9.)

8 After meeting and conferring, the parties agreed that there is a threshold issue
 9 that should be resolved by an early summary judgment motion before they litigate
 10 the issue of class certification, namely, whether Saks violated California Labor
 11 Code § 226 by providing Plaintiff with a pay stub attached to her paychecks that
 12 did not include the beginning pay-period date, when it also issued electronic wage
 13 statements that did contain the beginning pay-period date. (Joint Stip. at 2.)

14 On December 19, 2014, Saks filed the instant motion for summary judgment,
 15 (Doc. No. 15), and a related request for judicial notice, (Doc. No. 15-3). Plaintiff
 16 filed an opposition on February 9, 2015, (Doc. No. 19), and Saks replied on
 17 February 16, 2015, (Doc. No. 20).

18 DISCUSSION

19 A. Request for Judicial Notice

20 Saks asks the court to take judicial notice of two items from the docket for
 21 Peabody v. Time Warner Cable, Inc., No. CV 09-6485-AG (RNBx), which was
 22 litigated in the United States District Court for the Central District of California:
 23 (1) the plaintiff’s opposition to the defendant’s motion for summary judgment,
 24 dated August 9, 2010; and (2) the court’s order granting summary judgment for
 25 the defendant, dated November 1, 2010. (Doc. No. 15-3.) The documents are not
 26 available on the commercial legal databases, but are attached to Saks’s request
 27 for judicial notice. (Id., Exhs. A & B.) Saks contends that judicial notice of these

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documents is proper because they are court filings, publicly accessible on the Central District's CM/ECF website, and not subject to reasonable dispute. (Id. at 2.)

Plaintiff opposes Saks's request. (Doc. No. 19 at 8 n.2.) She asserts that the court should decline to take notice of the documents because Saks failed to show why they are appropriate for judicial notice or relevant to this case. (Id.) She argues that "[t]he only apparent purpose of Saks' request is to imbue the documents with precedential value they neither have nor can acquire." (Id.)

Rule 201 is a method of establishing facts that are not reasonably subject to dispute, not legal principles. See Fed. R. Evid. 201(a) & advisory committee note to subdivision (a) (regarding the difference between adjudicative facts and legislative facts). Here, Saks asks the court to consider Peabody for the legal principle it represents, not to establish a fact at issue in this case. Although the order was not published in the commercial legal databases, there is nothing special, in precedential terms, about the orders that are selected (or not selected) for inclusion in the commercial databases, and it is well established that courts may consider the legal reasoning and conclusions of other federal courts without resort to Rule 201. See McVey v. McVey, 26 F. Supp. 3d 980, 984–85 (C.D. Cal. 2014) (collecting cases). The court, therefore, denies Saks's request for judicial notice, but will consider the documents for whatever value they may have as non-binding precedent.

B. Motion for Summary Judgment

1. Legal Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute of fact is material if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

1 When ruling on a motion for summary judgment, the court must view the evidence
 2 in the light most favorable to the nonmoving party, and must draw all justifiable
 3 inferences in the nonmovant's favor. See Johnson v. Poway Unified Sch. Dist.,
 4 658 F.3d 954, 960 (9th Cir. 2011).

5 **2. Inadequate Wage-Statement Claim**

6 Plaintiff's first cause of action is for inadequate wage statements under
 7 California Labor Code § 226(a), which requires employers to provide accurate
 8 itemized wage statements to employees that provide nine pieces of information.
 9 Section 226(a) reads in relevant part:

10 Every employer shall, semimonthly or at the time of each payment
 11 of wages, furnish each of his or her employees, either as a detachable
 12 part of the check, draft, or voucher paying the employee's wages,
 13 or separately when wages are paid by personal check or cash, an
 14 accurate itemized statement in writing showing (1) gross wages
 15 earned, (2) total hours worked by the employee [except for salaried
 16 employees], (3) the number of piece-rate units earned [if applicable],
 17 (4) all deductions . . . , (5) net wages earned, (6) the inclusive dates
 18 of the period for which the employee is paid, (7) the name of the
 19 employee and only the last four digits of his or her social security
 20 number or an employee identification number other than a social
 21 security number, (8) the name and address of the legal entity that is
 22 the employer . . . , and (9) all applicable hourly rates in effect during
 23 the pay period and the corresponding number of hours worked.

18 Cal. Lab. Code § 226(a).

19 Section 226(e) provides a remedy for an employee injured by an employer's
 20 failure to comply with these requirements. It provides:

21 An employee suffering injury as a result of a knowing and intentional
 22 failure by an employer to comply with subdivision (a) is entitled to
 23 recover the greater of all actual damages or fifty dollars (\$50) for the
 24 initial pay period in which a violation occurs and one hundred dollars
 (\$100) per employee for each violation in a subsequent pay period, not
 to exceed an aggregate penalty of four thousand dollars (\$4,000), and is
 entitled to an award of costs and reasonable attorney's fees.

25 Cal. Lab. Code § 226(e).

26 Thus, a claim for damages under § 226(e) requires proof of three elements:
 27 (1) a violation of § 226(a); (2) that is "knowing and intentional"; and (3) a resulting
 28 injury. See Willner v. Manpower Inc., 35 F. Supp. 3d 1116, 1128 (N.D. Cal. 2014).

1 Saks contends that it is entitled to summary judgment in its favor because Plaintiff
2 cannot establish any of these elements. The court takes each of them in turn.

3 **a. Violation of § 226(a)**

4 Plaintiff asserts that Saks violated § 226(a) because the pay stubs attached
5 to her paychecks lacked the beginning date of the pay period. She cites three
6 cases that, indeed, held that wage statements violated § 226(a)(6) because they did
7 not include the beginning date of each pay period. See Willner, 35 F. Supp. 3d at
8 1129 (“A failure to include the start date of the pay period in a statement constitutes
9 a violation of Section 226(a)(6).”); McKenzie v. Fed. Express Corp., 765 F. Supp.
10 2d 1222, 1229 (C.D. Cal. 2011) (“FedEx violated Labor Code Section 226(a)(6) by
11 failing to include the beginning date for the pay period in its wage statements until
12 December of 2009.”); Lopez v. G.A.T. Airline Ground Support, Inc., 2010 WL
13 2839417, at *6 (S.D. Cal. 2010) (“It is . . . undisputed that GAT’s wage statements
14 indicate only the end date for each pay period, and do not list the beginning date.”).

15 Saks does not dispute that the itemized pay stubs Plaintiff received did not
16 include the beginning date of each pay period. (Joint Stip. ¶ 3.) However, it points
17 out that none of Plaintiff’s cases involved the situation here, where the employer
18 additionally provided a compliant wage statement. It asserts that the pay stubs
19 Plaintiff received were merely in addition to the electronic wage statements, which
20 contained all of the required information and were readily accessible to Plaintiff
21 through the company’s ESS website. (Doc. No. 15-1 at 5–8.)

22 As to the law, Saks contends that it is well settled that employers can satisfy
23 their obligations under § 226(a) by furnishing electronic wage statements, and that
24 “multiple district courts in California have agreed that an employer satisfies Labor
25 Code § 226 so long as it provides a compliant wage statement, even if the actual
26 paystubs attached to its paychecks did not contain all the information required by
27 Labor Code § 226.” (Id. at 6–7.)

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1 Saks is correct that an electronic wage statement can satisfy an employer's
 2 obligations under § 226(a), at least under some circumstances. In 2006 the
 3 California Department of Labor Standards Enforcement ("DLSE") issued an opinion
 4 letter approving a plan to implement an electronic wage-statement system, subject
 5 to certain conditions. See DLSE Opinion Letter No. 2006.07.06 (July 6, 2006),
 6 available at <http://www.dir.ca.gov/dlse/opinions/2006-07-06.pdf>.

7 Saks is also correct that employers can satisfy § 226(a) by providing a wage
 8 statement on a separate piece of paper that is not attached to the paycheck as a
 9 detachable stub. In Ruelas v. Costco Wholesale Corp., 2014 WL 4421572 (N.D.
 10 Cal. Sept. 8, 2014), the plaintiff asserted that Costco violated § 226(a) because the
 11 detachable portion of his paycheck did not include his name or the start date of the
 12 pay period. See id. at *2. The court dismissed the claim because it was undisputed
 13 that the plaintiff had received a compliant itemized wage statement, which was
 14 stapled to the paycheck. See id. The court relied on the DLSE opinion letter, which
 15 "confirmed that Section 226(a)'s purpose is to allow the continued use of detachable
 16 pay stubs but does not require them." Id. at *2 & n.28.

17 But it is not clear that providing an electronic wage statement satisfies
 18 § 226(a) when, as in this case, an employee has chosen to be paid by hard-copy
 19 check.

20 The beginning point of this analysis is the statute, which is silent about
 21 electronic wage statements. As noted above, it requires employees to

22 *at the time of each payment of wages, furnish each of his or her*
 23 *employees, either as a detachable part of the check, draft, or voucher*
 24 *paying the employee's wages, or separately when wages are paid by*
personal check or cash, an accurate itemized statement in writing

25 Cal. Lab. Code § 226(a) (emphasis added). A plain reading of this language
 26 suggests that a written statement must be supplied together with a paper paycheck,
 27 either as a stub or a separate piece of paper. But the language does not clearly
 28 foreclose Saks's position either.

1 The primary California authority on electronic wage statements appears
 2 to be the DLSE opinion letter mentioned earlier. It approves the use of electronic
 3 wage statements, but only so long as employees retain the right to elect to receive
 4 hard-copy statements. The letter discusses the purpose of § 226(a):

5 The purpose of the wage statement requirement is to provide
 6 transparency as to the calculation of wages. A complying wage
 7 statement accurately reports most of the information necessary for an
 8 employee to verify if he or she is being properly paid in accordance
 with the law and that all deductions from wages are proper. Section
 226(a) makes it possible for an employee to retain a copy of his/her
 own pay records which are not subject to alteration.

9 Id. at 2 (footnote omitted). It explains that an electronic statement can qualify as
 10 a statement in writing because California Labor Code § 8 defines a writing as “any
 11 form of recorded message capable of comprehension by ordinary visual means.”
 12 Id. (internal quotation marks omitted). Although the reference to “detachable part
 13 of the check” could be read to always require hard-copy, it says, “in the context of
 14 the entire subsection it appears to allow for the continued use of the convenient
 15 and traditional ‘pay stub’ alternative to a separate statement in writing.” Id. It
 16 concludes that electronic wage statements are permissible, but only under certain
 17 circumstances:

18 The apparent intent of both forms of wage statements described in
 19 Section 226(a) is to allow employees to maintain their own records of
 20 wages earned, deductions, and pay received. The Division in recent
 21 years has sought to harmonize the “detachable part of the check”
 22 provision and the “accurate itemized statement in writing” provision of
 23 Labor Code section 226(a) by allowing for electronic wage statements
*so long as each employee retains the right to elect to receive a written
 paper stub or record* and that those who are provided with electronic
 wage statements retain the ability to easily access the information and
 convert the electronic statements into hard copies at no expense to the
 employee.

24 Id. at 2–3 (emphasis added).

25 Although the letter is not binding authority, it appears to be the primary
 26 state-law authority, and it indicates that when an employee has chosen to receive
 27 a written pay stub or record, the employee is entitled to one that satisfies § 226(a).
 28 Saks does not address the letter or its limitations on electronic statements, although

1 the letter was the basis of the relevant holdings in two of Saks's cases. See Ruelas,
 2 2014 WL 4421527, at * 2 & n.28; Apodaca v. Costco Wholesale Corp., 2014 WL
 3 2533427, at *2 (C.D. Cal. June 5, 2014).

4 Saks relies on Peabody v. Time Warner Cable, Inc., No. CV 09-6485-AG
 5 (RNBx) (C.D. Cal. Nov. 1, 2010),¹ for the proposition that an employer does not
 6 violate § 226(a) when it provides a noncompliant pay stub, so long as it provides
 7 a compliant electronic statement. The court in Peabody indeed granted summary
 8 judgment on a § 226(a) claim regarding a defective pay stub because the online
 9 wage statements contained the missing information. See id. at 7. But the one-
 10 sentence analysis is unsupported by any reasoning or legal authority,² and it is not
 11 clear what the facts were. Hence, Peabody's value as persuasive authority is
 12 minimal at best.

13 The only other case this court is aware of that involved both a paper stub
 14 and an online wage statement appears to have analyzed the stub and the electronic
 15 statement separately:

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 17 ¹ This unpublished order was the subject of Saks's request for judicial notice.
 18 As discussed earlier, it is not available on the commercial legal databases.

19 ² The entire discussion of the § 226 claim in Peabody reads as follows:

20 Plaintiff argues that her wage statements were defective under
 21 California Labor Code § 226 because they failed to list her hours
 worked and the name of her employer. (Opposition at 23:6–13.)

22 There is no genuine issue of fact regarding the wage statements.
 23 Under § 226(a), Defendant need not list hours worked by Plaintiff
 24 because she was a salaried employee and she was exempt from
 overtime pay. And Plaintiff's online wage statements identified
 Time Warner Entertainment as her employer. (Marquez Decl., Ex. A,
 Dkt. #24-3.)

25 Defendant's Motion for Summary Judgment is GRANTED as to this
 26 claim.

27 Peabody, No. CV 09-6485-AG (RNBx), at 7.

1 The trial court stated, “Clearly, this pay stub, which plaintiff says is
 2 typical, does not comply with Labor Code section 226, and Sears does
 3 not argue that it does.” The trial court determined that Sears’ electronic
 pay stubs are also deficient.

4 Ortega v. Sears, Roebuck & Co., 2011 WL 1991957, at *4 (Cal. Ct. App. May 24,
 5 2011) (bracket omitted). But the decision addressed class certification, and, like
 6 Peabody, it offers no sign of the reason for that approach.³

7 In this case, Plaintiff elected to receive a hard-copy paycheck. The handbook
 8 she was given stated that live paychecks would be accompanied by a statement of
 9 earnings, and the stubs she received appear to be just that, except that they do not
 10 list the beginning date of the pay period, thus failing to comply with § 226(a)(6).
 11 And, according to Plaintiff, there was no indication that the online statements
 12 contained anything different from the ones that were mailed to her. In light of these
 13 facts, the purposes underlying the statute, the DLSE’s interpretation of it, Saks’s
 14 failure to address the DLSE letter and its limitations on electronic statements, and
 15 the unsettled state of the law, the court concludes that Saks is not entitled to
 16 judgment as a matter of law on this issue.

17 **b. “Knowing and Intentional”**

18 Section 226(e) defines “knowing and intentional” as follows:

19 For purposes of this subdivision, a “knowing and intentional failure”
 20 does not include an isolated and unintentional payroll error due to a
 21 clerical or inadvertent mistake. In reviewing for compliance with
 22 this section, the factfinder may consider as a relevant factor whether
 the employer, prior to an alleged violation, has adopted and is in
 compliance with a set of policies, procedures, and practices that fully
 comply with this section.

23 Cal. Lab. Code § 226(e)(3).

24 Few cases have applied the “knowing and intentional” standard in the
 25 context of this statute. The most comprehensive treatment appears to be in Willner
 26 v. Manpower Inc., 35 F. Supp. 3d 1116 (N.D. Cal. 2014). The court in Willner

27 ³ “[W]e are not precluded from considering unpublished state court
 28 opinions.” Nunez v. City of San Diego, 114 F.3d 935, 942 n.4 (9th Cir. 1997).

1 identified three principles from the language of the statute: first, “knowing and
 2 intentional” requires something more than a violation of § 226(a) alone; second, a
 3 “knowing and intentional” failure must be more than an “isolated and unintentional
 4 payroll error due to a clerical or inadvertent mistake”; and third, whether a violation
 5 of § 226(a) was “knowing and intentional” is a factual determination. Id. at
 6 1130–31. Based on those conclusions and California courts’ definition of the
 7 similar phrase “willingly and knowingly,” which appears in other sections of
 8 the California Labor Code, the court concluded that “a ‘knowing and intentional’
 9 violation requires a showing that the defendant knew that facts existed that brought
 10 its actions or omissions within the provisions of section 226(a).” Id. at 1131.

11 Plaintiff contends that Saks knowingly and intentionally violated § 226(a)
 12 under this definition because Saks affirmatively mailed multiple defective wage
 13 statements to her; it stipulated that the statements did not comply with § 226(a)(6);
 14 it admitted during discovery that it mailed defective statements to class members
 15 between July 14, 2013, and June 27, 2014; and it admitted that its internal payroll
 16 department created and mailed the paychecks. (Doc. No. 19-1 at 13–14.)

17 Saks does not take issue with Plaintiff’s evidence or the analysis in Willner.
 18 Rather, it argues that the omission of the beginning dates from the pay stubs was
 19 not a “willful and intentional violation of Labor Code § 226” because the electronic
 20 wage statements included the pay-period beginning dates. (Doc. No. 15-1 at 10.)

21 Saks’s argument is unsupported and misses the mark. Under the standard
 22 persuasively articulated in Willner, the employee must show only that the employer
 23 “knew that its wage statements did not contain the inclusive dates of the period for
 24 which its employees were paid.” 35 F. Supp. 3d at 1131. Whether the employer
 25 knew it was violating § 226(a) is irrelevant. See id.; accord Perez v. Safety-Kleen
 26 Sys., Inc., 2007 WL 1848037, at *9 (N.D. Cal. June 27, 2007) (ignorance of the law

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1 does not excuse a violation of § 226).⁴

2 Saks asserts in its reply brief that it had systems in place such that pay-period
3 beginning dates would be on its wage statements, as evidenced by the electronic
4 wage statements, and that Plaintiff has presented no evidence that the lack of the
5 dates on her pay stubs was anything more than a clerical oversight. (Doc. No. 20
6 at 8.)

7 However, arguments raised for the first time in a reply brief are improper,
8 and the court need not consider them. See Zamani v. Carnes, 491 F.3d 990, 997
9 (9th Cir. 2007). Considering such arguments “would unfairly deny the non-moving
10 party an opportunity to respond.” Rosales v. FitFlop USA, LLC, 882 F. Supp. 2d
11 1168, 1176 (S.D. Cal. 2012).

12 Regardless, Saks admitted that its internal payroll department created the
13 defective pay stubs and mailed them to every employee who received a hard-copy
14 paycheck for almost a year. This is sufficient to create a genuine dispute regarding
15 whether this element is satisfied. This is not, therefore, an issue that can be resolved
16 by summary judgment.

17 **c. Resulting Injury**

18 Effective January 2013, the California legislature amended § 226(a) to clarify
19 the injury requirement under § 226(e). The amended version reads in relevant part:

20 An employee is deemed to suffer injury for purposes of this
21 subdivision if the employer fails to provide accurate and complete
22 information as required by any one or more of items (1) to (9),
23 inclusive, of subdivision (a) and *the employee cannot promptly and*
24 *easily determine from the wage statement alone* one or more of the
25 following: . . . any of the . . . information required to be provided
26 on the itemized wage statement pursuant to items (2) to (4), inclusive,
27 (6), and (9) of subdivision (a).

28 ⁴ The scienter requirement for a § 226 violation, that it be “knowing and intentional,” suggests that an employer must not only have knowledge of the omitted information, but that the employer *intended* that to be the case. Although Willner does not address whether the term “intentional” adds anything to “knowing,” this court agrees with the analysis in Willner as far as it goes.

1 For purposes of this paragraph, “promptly and easily determine” means
 2 a reasonable person would be able to readily ascertain the information
without reference to other documents or information.

3 Cal. Lab. Code § 226(e)(2)(B)(i) and (e)(2)(C) (emphasis added). Thus, the injury
 4 requirement is met if the employee must refer to “other documents or information”
 5 beyond the four corners of each wage statement to determine the inclusive dates of
 6 the pay period.

7 Plaintiff asserts that she suffered an injury within the meaning of the statute
 8 because she “cannot determine the beginning pay period dates by examining her
 9 hard copy wage statements alone.” (Doc. 19 at 11.)

10 Saks essentially concedes that Plaintiff would need to refer to outside
 11 information to determine the relevant dates, as it argues that she did not suffer an
 12 injury because she could determine the pay period by counting back seven days
 13 from the end date on her pay stubs, since she “knew that she was paid on a weekly
 14 basis based on her own receipt of her paychecks as well as information provided to
 15 her by Saks during orientation and her employee handbook.” (Doc. No. 15-1 at 9.)

16 Saks relies on two cases that rejected § 226(a) claims because the only injury
 17 alleged was the need to perform “simple math” to determine the accuracy of the
 18 paycheck. See Price v. Starbucks Corp., 192 Cal. App. 4th 1136, 1142–44 (2011);
 19 Alonzo v. Maximus, Inc., 832 F. Supp. 2d 1122, 1135–36 (C.D. Cal. 2011). As
 20 Plaintiff points out, however, these cases predate the 2013 amendments.

21 Based on the court’s review of the individual stubs, there is no way to
 22 determine the pay-period start date. Plaintiff has, thus, presented evidence of an
 23 injury within the meaning of the statute, and Saks has not shown that it is entitled
 24 to judgment on this issue.

25 **3. PAGA Claim**

26 Plaintiff’s second cause of action, for penalties under the Private Attorneys
 27 General Act (“PAGA”), California Labor Code § 2699, is derivative of her claim
 28 for inadequate wage statements under California Labor Code § 226(a).


1 Saks asserts that it is entitled to judgment on this claim because Plaintiff's
2 § 226(a) claim fails. (Doc. No. 15-1 at 10–11.) However, as discussed above,
3 Plaintiff has presented a triable § 226(a) claim.

4 **CONCLUSION**

5 Saks's motion for summary judgment, (Doc. No. 15), and its related request
6 for judicial notice, (Doc. No. 15-3), are DENIED.

7 IT IS SO ORDERED.

8 DATED: March 26, 2015

9 
10 Hon. Jeffrey T. Miller
United States District Judge